

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

March 28, 2005

ANDREY KAMUNANTO MURTANO,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 04B00057
C.R. ENGLAND, INC.,)	
Respondent.)	
_____)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This is an action arising under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b (2004) (INA) in which Andrey Murtano is the complainant and C.R. England, Inc. (C.R. England or the company) is the respondent. Murtano is a native and citizen of Indonesia, and an asylee authorized as such to work in the United States. C.R. England is a nationwide corporation which has its principal place of business in Salt Lake City, Utah. The company owns and operates commercial motor vehicles and is engaged in the business of transporting hazardous and non-hazardous materials throughout the United States and Canada. It employs more than 3000 workers.

Murtano filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that in August, 2003 he applied to C.R. England's Philadelphia facility for a job as a truck driver but that the company refused to hire him because of his Indonesian national origin and citizenship status. He also alleged that the company rejected his Employment Authorization Document (EAD). C.R. England filed an answer denying the material allegations of the complaint and asserting two affirmative defenses. The company says the reason it didn't hire Murtano was that federal regulations then in effect rendered him ineligible for a hazardous materials endorsement (Hazmat endorsement or HME) for a commercial driver's license (CDL), and all C.R. England's truck drivers are required to have or be eligible for such an endorsement. Presently pending is C.R. England's Motion for Summary Decision, to which Murtano has responded. The Motion is ripe for decision.

II. THE MOTION

Although § 1324b(a)(1) contains a general prohibition against discrimination in hiring, the statute also contains exceptions which wholly exempt certain claims from its coverage and which may be raised by way of affirmative defense. The instant motion is premised upon two of those defenses which the company says apply to this case.

C.R. England's first affirmative defense is based on an exception that applies exclusively to claims of citizenship discrimination. That exception provides that the statute does not apply to discrimination which is required in order to comply with a law, regulation, or executive order. 8 U.S.C. § 1324b(a)(2)(C). The company says it hires as drivers only persons who hold or are eligible to hold a hazardous materials endorsement for a commercial driver's license, and that federal regulations in effect when Murtano applied permitted states to issue such an endorsement only to United States citizens or lawful permanent residents. Murtano was neither.

The second affirmative defense is based on an exception that applies exclusively to claims of national origin discrimination. It provides that § 1324b has no application to claims of national origin discrimination where the same alleged acts are covered under section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (Title VII). 8 U.S.C. § 1324b(a)(2)(B). Title VII generally applies to employers who have 15 or more employees for 20 or more weeks in a calendar year. 42 U.S.C. § 2000e-2 (2004). The company contends that because it regularly employs in excess of 3000 people, Murtano's national origin claim is already covered under Title VII and is therefore barred by this exception.

Murtano filed a response to the motion, together with an affidavit. He argued with respect to the first defense that the federal regulation at issue was only an interim rule which was therefore nonbinding and had only persuasive authority; he also said the rule was inconsistent with the statute pursuant to which it was allegedly promulgated. Murtano did not dispute the assertion that C.R. England had 3000 employees nor did he otherwise address either the company's second defense or his own allegation in the complaint that his Employment Authorization Document had been rejected. An employer's rejection of facially sufficient work authorization documents presented to satisfy the requirements of the employment eligibility verification process is potentially a separate violation under § 1324b(a)(6), and is colloquially referred to as document abuse.

Materials accompanying the motion consisted of A) the Affidavit of Gordon Lambert, B) the Affidavit of Rhonda Meichen, and C), a collection of statutory and regulatory materials consisting of seven subparts: 1) four pages from H.R. 3162, 107th Congress, 1st Session (2001)¹; 2) 11 selected pages from 49 C.F.R. Ch. XII, Subchapter D, Pt. 1572; 3) Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial

¹ H.R. 3162 is the bill which became the Patriot Act, see *infra*.

Driver's License, 68 Fed. Reg. 23852-01 (May 5, 2003); 4) 18 selected pages from 49 C.F.R. Ch. III, Subchapter B, Pt. 383; 5) Limitations on the Issuance of Commercial Driver's Licenses with a Hazardous Materials Endorsement, 68 Fed. Reg. 23844-01 (May 5, 2003); 6) 10 selected pages from 49 C.F.R. Ch. I, Subchapter A, Pt. 105, Subchapter C, Pts. 171, 175, and 176; and 7) Hazardous Materials: Enhancing Hazardous Materials Transportation Security, 68 Fed. Reg. 23832-01 (May 5, 2003). Murtano filed no responsive evidentiary materials other than his affidavit.

III. STATUTORY AND REGULATORY BACKGROUND

In the period immediately following the events of September 11, 2001 Congress enacted a variety of measures designed to enhance the security of the United States. The first major legislative response to those events was the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept Terrorism Act of 2001 ("USA Patriot Act"), Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered titles and sections of the U.S. Code). Section 1012 of the Patriot Act amended the Hazardous Materials Transportation Act, 49 U.S.C. Ch. 51, by adding a new section 5103a entitled "Limitation on issuance of hazmat licenses." The new section called for a background records check by the Attorney General of an individual applying for such licensing, 49 U.S.C. § 5103a(c), and a determination by the Secretary of Transportation after the records check that the individual did not pose a security threat. 49 U.S.C. § 5103a(a).

Shortly thereafter, on November 19, 2001 Congress enacted the Aviation and Transportation Security Act (ATSA), Pub. L. No. 107-71, 115 Stat. 597 (2001), which created the Transportation Security Agency (TSA) as a new agency within the Department of Transportation. The agency's mission was to enhance the security of our national aviation, rail, shipping, and commercial motor transportation systems; it was tasked as well with the responsibility of identifying individuals who pose a threat to transportation security. TSA was authorized to issue, rescind, and revise such regulations as it found necessary to carry out its mission. 49 U.S.C. § 114(l)(1).²

Pursuant to that authority the Transportation Security Agency subsequently issued interim final

² Section 403(2) of the Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, 116 Stat. 2135, as amended, subsequently effected the transfer of the TSA from the Department of Transportation to the Department of Homeland Security (DHS). HSA § 203. *See also* HSA §§ 423-24, 426. The Secretary of Transportation delegated certain of his functions under ATSA to HSA to facilitate the transfer. Organization and Delegation of Powers and Duties, Update of Secretarial Delegations, 68 Fed. Reg. 10988 (March 7, 2003). Rules making conforming technical changes to various regulations and definitions as necessitated by the transfer are found at Transportation Security Administration Transition to Department of Homeland Security; Technical Amendments Reflecting Organizational Changes, 68 Fed. Reg. 49718-01 (August 19, 2003).

rules to establish security threat assessment standards warranting the denial of a hazardous materials endorsement to an individual (Exhibit C3). The interim final rules, codified at 49 C.F.R. Pts. 1570 and 1572, provided inter alia that in order to obtain a hazardous materials endorsement an individual had to be a citizen of the United States who has not renounced his or her citizenship, or a lawful permanent resident of the United States (Exhibit C2).

Other affected agencies within the Department of Transportation, notably the Federal Motor Carrier Safety Administration (FMCSA) and the Research and Special Programs Administration (RSPA), issued contemporaneous interim final rules in coordination with the TSA rules. The Federal Motor Carrier Safety Administration interpreted the Patriot Act as a de facto amendment to its existing fitness and testing standards governing the issuance of commercial driver's licenses and endorsements to such licenses for the transportation of hazardous materials (Exhibit C5). Because an individual had to satisfy the TSA security risk standards to obtain a hazardous materials endorsement, the new FMCSA regulations contained the requirement that an individual applying for such an endorsement had to provide proof of United States citizenship or, for a lawful permanent resident, proof of status and an alien registration number. 49 C.F.R. § 383.71(a)(9). All shippers and other transporters of hazardous materials are obliged to comply with FMCSA security regulations that apply to motor carrier and vessel transportation. 49 C.F.R. § 383.3(a). Those regulations thus apply to every person who operates a commercial motor vehicle in interstate commerce and all employees of such persons.

The Research and Special Programs Administration is the agency which, inter alia, identifies hazardous materials and establishes rules regulating the fabrication, classification, packaging, labeling, placarding and transportation of such materials. Its Hazardous Materials Regulations appear at 49 C.F.R. Pts. 171-180. RSPA's interim final rules incorporated FMCSA's requirement that all shippers and transporters of certain hazardous materials must comply with federal security regulations applicable to motor carrier and vessel transportation (Exhibit C7). Both civil and criminal penalties are set out in the RSPA regulations for any person who knowingly violates a requirement of federal hazardous material transportation law. 49 C.F.R. § 171.1(c).

Another provision having a potential effect on the transportation of one discrete category of hazardous materials is 18 U.S.C. Ch. 40, which generally regulates the importation, manufacture, distribution and storage of explosive materials, blasting agents, and detonators. The Safe Explosives Act (SEA), enacted on November 25, 2002 as part of the Homeland Security Act, §§ 1121-24, amended these provisions to provide tighter security for explosive materials. The amended provision required all persons receiving explosives on or after May 24, 2003 to obtain a federal license or permit, and established penalties for the distribution of explosives to persons other than licensees or holders of user permits. 18 U.S.C. §§ 841-43 (2002). The Homeland Security Act also transferred law enforcement responsibility for 18 U.S.C. Ch. 40 to a new Bureau of Alcohol, Tobacco, Firearms and Explosives in the Department of Justice. HSA § 111. The Bureau subsequently published Interim Final Rules implementing the Act. *See* Implementation of the Safe Explosives Act, Title XI, Subtitle C of Public Law 107-296, 68 Fed.

Reg. 13768 (March 20, 2003) and Implementation of the Safe Explosives Act, Title XI, Subtitle C of Public Law 107-296 – Delivery of Explosive Materials by Common or Contract Carrier, 68 Fed. Reg. 53509 (September 11, 2003).

TSA's May 5, 2003 interim final rules were eventually modified as a result of comments the agency received from states, trucking companies, and drivers. Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Driver's License, 69 Fed. Reg. 68720 (November 24, 2004) (to be codified as 49 C.F.R. § 1572.105).³ Among the revised provisions is one enlarging the categories of persons eligible for a hazardous materials endorsement to include authorized aliens regardless of whether they have obtained lawful permanent resident status. The new interim rule now in effect thus no longer categorically excludes refugees, asylees, lawful temporary residents, and work authorized nonimmigrants from consideration for a hazardous materials endorsement.

IV. UNDISPUTED FACTS ESTABLISHED BY THE RECORD

The material facts in this case are essentially undisputed. The affidavit of Rhonda Meitchen identifies the affiant as a recruiter for C.R. England whose job includes contacting job applicants before they are hired and brought in for orientation. She said that part of the final booking checklist was to ask a truck driver applicant for proof of status as a United States citizen or a lawful permanent resident. She said that records indicate she telephoned Murtano on September 19, 2003 to complete the hiring process and asked him for proof of his immigration status, but that Murtano told her he did not have a green card. She then advised him that if he was not a citizen or lawful permanent resident he was not eligible for hire by the company as a truck driver.

Murtano's affidavit says that he was granted asylum in June, 2000, that he has been authorized for employment in the United States since September, 2000, and that the Pennsylvania Department of Transportation issued him a commercial driver's license learning permit on June 25, 2003. He says he applied to C.R. England for work as a truck driver in August, but that Rhonda told him in September that he could not be hired "because their insurance company would not permit the hiring of immigrants who did not have permanent resident status." The affidavit of Gordon Lambert states that the affiant is the company's Vice President of Safety, and that as such he is responsible for the areas of safety and regulatory compliance. He is familiar with the regulatory requirements regarding eligibility for a hazardous materials endorsement and said the company hires as drivers only individuals who qualify for such an endorsement. He said the company had to change its hiring policy because of the new federal regulations issued in May, 2003. Before that the company did not exclude drivers based on their immigration status as long as they were eligible to work in the United States. C.R. England had to change its policy to

³ The new interim final rule also included a request for comments the deadline for which was December 27, 2004. The final rule has not yet been issued.

comply with the regulations and that is when they started asking applicants if they were citizens or permanent residents.

Lambert also attested that C.R. England regularly has more than 3000 employees.

V. DISCUSSION AND ANALYSIS

A. Citizenship Status Discrimination

Murtano first argues that an interim regulation should not be allowed to provide a “cover” for discrimination. This assertion is unelaborated. The regulations here not only do not provide a “cover” for discrimination; they are discriminatory on their face: they excluded Murtano from consideration for a hazardous materials endorsement because of his status as an asylee. The question is not whether C.R. England’s failure to hire Murtano was discriminatory but whether that discrimination was required by federal regulations and is thus excluded from statutory coverage under § 1324b because of the safe harbor exemption provided by § 1324b(a)(2)(C). I conclude that it was.

OCAHO cases have applied the § 1324b(a)(2)(C) exception to excuse acts of citizenship status discrimination taken pursuant to state law, *see, e.g., U.S. v. Patrol & Guard Enters., Inc.*, 8 OCAHO no. 1040, 603, 628 (2000)⁴ (New York law required security guards to be citizens or lawful permanent residents), *Anderson v. Newark Pub. Sch.*, 8 OCAHO no. 1024, 361, 372 (1999) (New Jersey law limited tenure for public school teachers to United States citizens); *Elhajomar v. City and County of Honolulu*, 1 OCAHO no. 246, 1581, 1589 (1990) (Hawaii law limited state, county, and municipal employment to citizens and lawful permanent residents); pursuant to federal law, *Parkin-Forrest v. Veterans Admin.*, 3 OCAHO no. 516, 1115, 1119 (1993) (federal law restricted employment of noncitizens by the Veterans Administration); pursuant to federal regulation, *Tovar v. United States Postal Serv.*, 1 OCAHO no. 269, 1720, 1731 (1990), *aff’d in part, rev’d in part, and remanded by* 3 F.3d 1271, 1282 (9th Cir. 1993) (postal regulation excluded aliens other than lawful permanent residents), *Sosa v. United States Postal Serv.*, 1 OCAHO no. 115, 752, 758-60 (1989) (same); and pursuant to government contract, *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1019 (1993) (contract

⁴ Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database “FIM-OCAHO” or on the website at <http://www.usdoj.gov/eoir/OcahoMain/ocahosibpage.htm#Published>.

incorporated federal security rules requiring exclusion from certain projects of designated country foreign nationals). The rules at issue here appear to be of the same character as the rules at issue in those cases.

Murtano contends, however, that the regulations at issue in this case were adopted on an interim basis and that therefore they are non-binding and have only persuasive authority. Notwithstanding Murtano's contention, the interim final rules were promulgated by three federal agencies as part of a comprehensive set of interim final rules and were made effective immediately upon their promulgation. Those regulations were thus in effect when Murtano applied to C.R. England, and he has cited no authority which would suggest otherwise. When an agency is given the power to make rules carrying the force of law and the agency subsequently promulgates rules in the exercise of such authority, those rules are ordinarily entitled to deference. *MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 516 (3d Cir. 2001). Such deference may not be withheld based on Murtano's unsupported assertions.

An interim final rule ordinarily is effective immediately; it also serves as a notice of proposed rulemaking (NPRM) and has the same effect as a final rule. *See* Michael Asimov, *Interim-Final Rules: Making Haste Slowly*, 51 Admin. L. Rev. 703, 704 (1999). The fact that TSA's May 5, 2003 rule was subsequently amended does not alter the result because any subsequent change in a rule is necessarily prospective only, unless the applicable statute permits retroactive rulemaking. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (absent statutory authority, retroactive rulemaking is invalid under the Administrative Procedure Act). This result is in accord with the longstanding principle that the law in effect at the time the events occurred is the law that will be applied to those events. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (considerations of fairness require that people have an opportunity to know what the law is and conform their conduct to it).

Murtano next contends that the interim final rule is inconsistent with the Patriot Act and points out that "the Patriot Act does not prohibit lawful permanent residents and other narrow categories of aliens from shipping or transporting explosives." While he calls upon the Patriot Act, he cites in a footnote in support of this proposition to a portion of 18 U.S.C. § 842(d)(7)(B):

"(d) It shall be unlawful for any person knowingly to distribute explosive materials to any individual who:

(7) is an alien, other than an alien who -

(A) is lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act); or

(B) is in lawful nonimmigrant status, is a refugee admitted under section 207 of the Immigration and Nationality Act (8 U.S.C. § 1157), or is in asylum status under section 208 of the Immigration and Nationality Act

(8 U.S.C. § 1158), and - ”

Conveniently omitted, however, is the remainder of the statutory provision, which further qualifies section (d)(7)(B) by requiring that an individual described therein also:

(i) is a foreign law enforcement officer of a friendly foreign government . . . entering the United States on official law enforcement business, and the shipping, transporting, possession or receipt of explosive materials is in furtherance of this official law enforcement business; or

(ii) is a person having the power to direct or cause the direction of the management and policies of a corporation, partnership, or association licensed pursuant to section 843(a) and the shipping, transporting, possession, or receipt of explosive materials is in furtherance of such power(.)

Murtano does not contend that he fits into either category (i) or category (ii). Rather, he appears to suggest that the TSA interim final rule is somehow invalidated by the fact that two narrow classes of aliens without permanent residency status are permitted under certain conditions to transport some quantities of some explosive materials. He is mistaken.

Generally speaking RSPA regulations apply to the commercial transportation of any quantity at all of selected agents or toxins, and to the commercial transportation of other substances designated under 49 U.S.C. § 5103a only if they are required by RSPA rules to be placarded. RSPA’s List of Hazardous Substances and Reportable Quantities is set out at Appendix A to 49 C.F.R. § 172.101 (Hazmat Table). RSPA classifies hazardous materials as 1) explosives, 2) compressed, flammable, nonflammable and poisonous gases, 3) flammable liquids, 4) flammable solids, 5) oxidizers and organic peroxide, 6) toxic infectious materials, 7) radioactive materials, 8) corrosive materials, and 9) miscellaneous dangerous substances and articles. Security Threat Assessment of Individuals Applying for a Hazardous Materials Endorsement, 68 Fed. Reg. 23852-01, 23855 (May 5, 2003). The categories may be further subdivided; for example, explosives are divided into six subcategories. *Id.*

An individual is not required under FMCSA rules to obtain a hazardous materials endorsement in order to transport nonplacarded quantities of explosive material, although the individual would still have to obtain the appropriate federal permit or license required by 18 U.S.C. § 843. The Department of Transportation has made a general determination that it is the placarding thresholds for shipments of explosives which pose the most significant security threat. 68 Fed. Reg. at 23856. TSA, in consultation with DOT, concurred that non-placarded shipments of explosives do not present sufficient security risk in transportation to warrant application of the TSA background check requirements. Thus the fact that a few narrow categories of nonresident aliens are not prohibited by 18 U.S.C. § 843(b)(1) from obtaining a license or permit to transport

some quantities of some explosives within the United States⁵ does not mean, as Murtano appears to imply, that there is an inconsistency between the Patriot Act and/or the Safe Explosives Act and the interim final rules. Nothing in either of those laws precludes a tiered security threat assessment by TSA with more stringent regulatory requirements for the most dangerous and lesser scrutiny for the less dangerous materials.

I conclude accordingly that there is no genuine issue of material fact and the respondent is entitled to summary decision on Mutano's claim of citizenship status discrimination. Even assuming arguendo that Meitchen mistakenly told Murtano that the source of the requirement was for insurance reasons, that fact cannot be regarded as material in the face of the express command of federal regulations in effect when Murtano applied which unequivocally precluded him from consideration for a hazardous materials endorsement. He is, however, now eligible for such an endorsement and the company has invited him to reapply.

B. National Origin Discrimination

Murtano made no response to that portion of the company's motion addressed to national origin discrimination and evidently does not dispute that C.R. England had 3000 employees or that the company is covered by Title VII. The claim of national origin discrimination will accordingly be dismissed. I conclude that there is no genuine issue of material fact and the respondent is entitled to summary decision on this count as well. OCAHO cases are legion for the proposition that § 1324b does not apply to claims of national origin discrimination where the claim is already covered by Title VII. *Lee v. AirTouch Communications*, 7 OCAHO no. 926, 49, 56 (1997).

C. Document Abuse

Neither party addressed the allegation that the company refused to accept Murtano's Employment Authorization Document. An employer's discriminatory rejection of apparently genuine documents presented for the purpose of satisfying a requirement of the employment eligibility verification system is unlawful under § 1324b(a)(6). Here the Meitchen and Murtano affidavits establish unequivocally that the hiring process never advanced to the point where the employment eligibility verification process even came into play, consequently this allegation must be dismissed as well. *Patrol & Guard*, 8 OCAHO no. 1040 at 619-20. Murtano applied for a job as a truck driver with C.R. England, but before he could actually be hired he had to show that he could qualify for a hazardous materials endorsement. The application process was terminated as soon as it became apparent that Murtano was ineligible for the endorsement, so the

⁵ TSA also adopted an interim final rule stating that the commercial transportation of explosives from Canada into the United States by persons other than United States citizens or lawful permanent residents is permissible only when the particular driver and carrier are already on TSA lists of pre-approved carriers. *Transportation of Explosives from Canada to the United States via Commercial Motor Vehicle and Railroad Carrier*, 68 Fed. Reg. 6083 (February 6, 2003) (codified at 49 C.F.R. § 1572.9).

employment eligibility verification process never began. I conclude therefore that there is no genuine issue of material fact as to this allegation and the respondent is entitled to summary decision on this count.

VI. FINDINGS OF FACT

- 1) Andrey Murtano is a native and citizen of Indonesia.
- 2) On or about June 19, 2000 Andrey Murtano was granted asylum in the United States.
- 3) On or about September 1, 2000 Andrey Murtano was granted employment authorization by the former Immigration and Naturalization Service.
- 4) On or about June 25, 2003 Andrey Murtano was granted a commercial driver's license learning permit by the Pennsylvania Department of Transportation.
- 5) C.R. England, Inc. owns and operates commercial motor vehicles that transport hazardous and non-hazardous materials throughout the United States and Canada.
- 6) C.R. England, Inc. has its principal place of business in Salt Lake City, Utah, and at all times pertinent to this action employed more than 3000 employees.
- 7) On or about August 1, 2003 Andrey Murtano applied to C.R. England, Inc. for a job as a truck driver.
- 8) C.R. England, Inc. hires as truck drivers only persons who have or are eligible for a commercial driver's license with a hazardous materials endorsement.
- 9) C.R. England, Inc. had to change its hiring practices after the Transportation Security Administration and other federal agencies issued interim final regulations on May 5, 2003.
- 10) After promulgation of the Transportation Security Administration's May 5, 2003 interim final rules, C.R. England, Inc. started asking applicants for truck driver jobs to provide proof of United States citizenship or lawful permanent residency status.
- 11) Rhonda Meitzen, a recruiter for C.R. England, Inc., telephoned Andrey Murtano in September, 2003, and told him that he could not be hired as a truck driver because he was neither a United States citizen nor a lawful permanent resident of the United States.
- 12) Murtano filed a charge with the Office of Special Counsel for Unfair Immigration-Related Employment Practices on or about December 1, 2003.

- 13) The Office of Special Counsel for Unfair Immigration-Related Employment Practices sent Murtano a letter on April 15, 2004 authorizing him to file a complaint with the Office of the Chief Administrative Hearing Officer within 90 days of his receipt of the letter.
- 14) Murtano filed a complaint with the Office of the Chief Administrative Hearing Officer on July 2, 2004.

VII. CONCLUSIONS OF LAW

- 1) This is an action arising under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b (INA) (2004).
- 2) Andrey Murtano is a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3)(B).
- 3) C.R. England, Inc. is an entity within the meaning of 8 U.S.C. § 1324b(a)(1).
- 4) All conditions precedent to the institution of this proceeding have been satisfied.
- 5) No state may issue a license to operate a motor vehicle transporting a hazardous material to an individual unless the Secretary of Transportation first determines that the individual does not pose a security risk warranting denial of the license. Hazardous Materials Transportation Act, 49 U.S.C. § 5103a (2003).
- 6) Interim final rules in effect between May 5, 2003 and November 24, 2004 permitted states to issue a hazardous materials endorsement for a commercial driver's license only to a United States citizen or a lawful permanent resident of the United States. 49 C.F.R. § 1572.105 (2003).
- 7) Murtano's citizenship status discrimination claim is excluded from coverage under the statute because C.R. England's refusal to hire him as a truck driver was required in order to comply with federal regulation within the meaning of 8 U.S.C. § 1324b(a)(2)(C).
- 8) Murtano's national origin discrimination claim comes within the coverage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 and accordingly is not cognizable in this forum. 8 U.S.C. § 1324b(a)(2)(B).
- 9) Murtano's claim of document abuse pursuant to 8 U.S.C. § 1324b(a)(6) must be dismissed because the parties never reached the point of engaging in the employment eligibility verification system set out in § 1324a(b).

- 10) There is no genuine issue of material fact and C.R. England is entitled to summary decision pursuant to 28 C.F.R. § 68.38(c).

ORDER

For the reasons more fully stated herein, the complaint is dismissed.

SO ORDERED.

Dated and entered this 28th day of March, 2005.

Ellen K. Thomas
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order seeks timely review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order.